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Opinion following remand by S. Ct.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALAN JAMES BRADLEY, Defendant and Appellant.	B202011 (Los Angeles County Super. Ct. No. BA271804)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lance A. Ito, Judge. Affirmed as modified.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

This case is before us on remand from the California Supreme Court. Pursuant to the Court's instructions, we are to vacate our previous opinion in this case and reconsider the cause in light of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, [129 S.Ct. 2527] (*Melendez-Diaz*).[1] (Cal.Rules of Court, rule 8.528(d).) After supplemental briefing, the matter was submitted on April 27, 2010.

PROCEDURAL BACKGROUND

A jury convicted Alan James Bradley (appellant) of first degree murder (Pen. Code, § 187, subd. (a))[2] (count 1) and false imprisonment (§ 236) (count 3). The jury found that the murder was committed during a rape. (§ 190.2, subd. (a)(17)(C).) The trial court found that appellant had suffered five prior serious or violent felony convictions and had served a prior prison term. (§§ 667, subds. (a)(1), (b)-(i), 667.5, subd. (b).) The trial court sentenced appellant to life without the possibility of parole on count 1 and a consecutive high term of three years on count 3.

Appellant appealed on the grounds that: (1) the trial court erred in admitting hearsay statements that violated the principles established in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and violated appellant's rights under the Sixth Amendment to the United States Constitution; (2) the evidence presented at trial was insufficient to support the verdict, which resulted in a violation of appellant's right to due process of law; and (3) appellant was denied the right to competent trial counsel and deprived of his constitutional rights under the Sixth and Fourteenth Amendments.

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1 The California Supreme Court also stated that appellant's case should be reconsidered in light of *Briscoe v. Virginia* ___ U.S. ___ [130 S.Ct. 1316] (*Briscoe*), which had not been handed down at the time of remand. Since *Briscoe* was remanded without opinion to the Supreme Court of Virginia for further proceedings in light of *Melendez-Diaz*, we reconsider this case in light of *Melendez-Diaz* only.

2 All further statutory references are to the Penal Code unless otherwise indicated.

This court issued an opinion affirming appellant's conviction. We concluded that the DNA evidence was properly admitted, that this evidence and other evidence was sufficient to support the jury's verdicts under the circumstances of this case, and that appellant's trial counsel was not ineffective for failing to object to the DNA evidence and to flaws in the chain of custody of that evidence.

Appellant petitioned for review, citing the same three arguments. With respect to the DNA evidence, which is the crux of this case, appellant argued that the trial court erroneously admitted DNA evidence obtained from samples collected from the crime scene in 1992. At the 2007 trial, there was no testimony from Lloyd Mahaney (Mahaney), the technician who collected the samples and prepared a "criminalistic report" and a form 81 (a sexual assault evidence data sheet). A supervising criminalist with the Los Angeles Department of the Coroner, Dan Anderson (Anderson) testified about the collection of evidence from the body and the reports prepared by Mahaney.

We rejected appellant's argument that Anderson's testimony constituted testimonial hearsay in violation of the confrontation clause as interpreted in *Crawford*. We based our decision on *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), which held that reports of DNA test results were not testimonial, and the admission of such evidence was therefore not prohibited by *Crawford*. (*Geier*, *supra*, at pp. 605-607.)

After the filing of this court's affirmance of appellant's conviction, the United States Supreme Court decided *Melendez-Diaz.* The Court held that certificates prepared by technicians who analyzed suspected illegal substances constituted testimonial statements that rendered "the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Melendez-Diaz, supra,* 557 U.S, at p. ___, [129 S.Ct. at p. 2530].)

On reconsideration of appellant's case in light of *Melendez-Diaz,* we affirm the judgment of the superior court. The opinion we now file presents a revised analysis of the first issue (the confrontation clause issue) but is generally the same as our original opinion in regard to the remaining issues and the factual summary.

FACTS

Prosecution Evidence

On the morning of December 29, 1992, Tibor Simon (Simon), a maintenance man for a property management company, went to 4322 Wilshire Boulevard with his boss. Water had leaked into the abandoned building, and it was damp and full of moss. Simon and his boss discovered a woman's body inside. They immediately left the building and called police.

Detective Frank Bolan and Detective Paul Coulter of the Los Angeles Police Department (LAPD) responded to the call at 4322 Wilshire Boulevard. The building runs the entire block between Plymouth Boulevard and Windsor Boulevard, extending eastward to run behind and wrap around the Dunes Hotel on Wilshire Boulevard. In a small room that served as the elevator lobby, they found the body of a woman with all her clothes and underwear ripped open and pushed behind her back. Nylons had been used to tie her ankles together and her hands behind her back. There was a pair of pants wrapped around the victim's neck. The victim's glasses were found inside the entrance from a walkway on the south side of the building. The entrance led into a stairwell. Buttons were found along a hallway leading from the stairwell and also in the elevator alcove. On all three floors of the building, there was evidence of occupation by squatters. There were food wrappers, trash, Christmas decorations, and toys. There were many cigarette butts and used condoms. Because of leaks in the building, most of the carpeting was soaked.

The return address on an unmailed letter found at the scene was that of V.M., who lived one block away on Plymouth Boulevard. V.M.'s car was found parked on Plymouth Boulevard between her apartment and the vacant building. The car had a parking ticket written on December 28, 1992, at 12:13 p.m.

Hilda Chapman (Chapman) had been friends with V.M. since 1954. V.M. had been a secretary and was 79 years old when she died. She was single and had lived on Plymouth Boulevard since the early 1970's. V.M. had spent Christmas with the

Chapmans, and Chapman had last spoken with V.M. on the morning of December 27, 1992, a Sunday. V.M. spoke of her plans to attend church with friends and then go to lunch.

Mahaney was a senior criminalist who retired a month before trial. Anderson testified that Mahaney evaluated the victim's body at the scene. Mahaney collected evidence from the body both at the scene and at the coroner's Forensic Science Center (FSC). Anderson reviewed the "criminalistic report" by Mahaney as well as the form 81 Mahaney filled out. Anderson did not speak with Mahaney or anyone else who was at the crime scene at any time.

The form 81 is a sexual assault evidence data sheet, and it documents where swabs and any other type of evidence are collected. It is a writing made in the regular course of business at the coroner's office. The form 81 in V.M.'s case bore the same number as the sexual assault kit. In the form, Mahaney documented when and where the swabs were collected.

Anderson also reviewed the evidence log and some investigative reports by the coroner's investigator, who acts as the eyes and ears of the pathologists who do not visit a crime scene. The evidence log was maintained in the regular course of business at the coroner's office. It listed all the evidence collected in this case and was made when the evidence was turned into the evidence room. The log also recorded when the evidence was released to law enforcement. The evidence log in this case was properly filled out. It showed that the evidence was collected by Mahaney at approximately 4:00 p.m. on December 29, 1992. It was received in the evidence room on January 7, 1993, at approximately 9:00 a.m. and released to someone from the LAPD with badge number 15103 on January 8, 1993. Anderson had difficulty reading the signature of the person from the LAPD.

Anderson also reviewed an LAPD preliminary report. Anderson obtained all of these records from the criminalistic folder for the case, which is a folder that the coroner's laboratory maintains of its involvement in each case. Every coroner's case is

assigned a unique case number. Sexual assault kits are also assigned a unique identifying number.

On December 29, 1992, Gerald Blanton (Blanton) was a criminalist with the LAPD, and he assisted with the investigation of the homicide at 4322 Wilshire Boulevard with lead criminalist Allison Ochiaie, who had since passed away. Blanton had no independent recollection of what happened at the crime scene but based his testimony on a review of the notes and photographs. He identified three envelopes he initialed that contained buttons collected from the hallway floor at the Wilshire scene. He collected a letter bearing the victim's return address label that was found leaning against a wall at the scene. He identified more buttons and some keys and sunglasses he collected from a stairwell. He identified a photograph of the elevator lobby where the victim was found. He identified pictures of items of clothing collected from the elevator lobby. His report said that a condom was collected from a raised planter area outside the building, and he identified a photograph of the condom in the planter and a photograph of a cigarette butt collected in the stairwell area.

Dr. Susan Selser performed an autopsy on V.M. The victim was found with a ligature made of a pair of blue pants around her neck. She had large areas of bruising on her face and extensive bruising on the inside of the mouth that constituted significant trauma. There was a slight hemorrhage on the outside of the soft tissue around the mouth and hemorrhage of the soft tissues deep in the neck at the back of the throat. These were probably caused by compression of the soft tissues of the mouth against the teeth. These injuries were highly suggestive of an element of suffocation or asphyxia by suffocation. The facial bruises were caused by blunt force, such as being punched in the face. V.M. also had abrasions on her hands, arms, left shoulder, chest, knees, left hip, and right buttock as well as three broken ribs. Dr. Selser found abrasions, bruising, and tears around the vagina, and redness on the clitoris. Dr. Selser listed the cause of V.M.'s death as suffocation and strangulation.

Detectives Bolan and Coulter were the investigating officers on the V.M. homicide. Detective Bolan confirmed that he was the LAPD member with badge number 15103 who collected all the evidence from the coroner's office on January 8, 1993, and took it to the Wilshire Station. There he numbered and packaged the items and booked them into evidence. The evidence included a sexual assault kit and a pubic hair kit.

Collin Yamauchi (Yamauchi), a criminalist with LAPD, analyzed the sexual assault evidence from the V.M. case in January 1993. His notes were not available but he reviewed his reports. He found semen on the condom. He found spermatozoa fragments on the external genital, anal, and vaginal slides and on the swabs from the same areas of the victim's body. He found amylase, a component of saliva, on the swab of the left nipple area.

Detective Coulter interviewed appellant on September 24, 2004, and obtained from him buccal swabs, hair, and blood, which were then booked into evidence. A recording of the interview was played for the jury and transcripts were provided. After being read his *Miranda*[3] rights, appellant told police that he had previously lived in the Wilshire area and volunteered that he had occasionally stayed at the Dunes hotel in the past. He said the hotel was located at Wilshire Boulevard and Windsor Boulevard. He remembered the office building by the Dunes hotel, but he did not stay in the building. He remembered it had been waterlogged. Appellant said he had never been inside the building. He said he used to sit in the stairwell of the building, take a hit of crack, and leave. He knew of a white guy who used to stay in the building. He said that the entrance was not on Wilshire Boulevard but on the back side, and there was a walkway between two streets on that side. He knew nothing about a lady being found murdered in the building, and he did not see how his DNA could have been found.

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3 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Dr. Winters Hardy, a criminalist with the City of Los Angeles, examined the rape evidence in the V.M. case on two occasions in 2004. The sexual assault kit was in a small box and was sealed when he collected it. The top-most seal bore the name of C. Yamauchi and was dated March 12, 1993. The vaginal sample did not have a lot of sperm present. In order to obtain a full and complete DNA profile, he submitted the external genital sample to Orchid Cellmark (Cellmark), a contractor that performs DNA testing. He also submitted a blood sample from V.M., a left nipple swab, and a buccal swab from appellant. He had no independent recollections of his actions but testified as to what he did as a matter of practice. He acknowledged that the sperm from the interior of the vagina could be from a different donor than that of the sperm on the external vagina. He was aware that the external genital sample had been linked to appellant.

Kelly Brockhohm (Brockhohm) was employed by Cellmark as a DNA analyst and received the evidence from V.M.'s case on October 5, 2004. Cellmark received the external genital swab, the left nipple swab, a reference sample bearing appellant's name, and a reference sample from V.M. Brockhohm performed DNA analysis on all samples and issued a report on December 20, 2004. On the nipple swab, there was DNA from a male and a female. The primary profile matched the blood from V.M., and appellant was excluded as a source of the DNA in that sample. The sample of the external genital area contained DNA from a male, and the primary DNA profile matched the DNA profile from appellant. The approximate frequency of this DNA profile is 1 in 13 quintillion individuals in the African-American population and the Caucasian population.

Defense Evidence

Debbie Daniels (Daniels) was a criminalist in the trace analysis unit of the LAPD. She testified regarding her report dated June 11, 1993, on her comparison of pubic hair combings from the victim to the victim's pubic hair. She received the pubic hair combings from Yamauchi. The decedent's pubic hair kit was in the LAPD property room, where it was held after being collected from the coroner. Because her examination of the pubic hair combing showed a single human hair that she believed was not of pubic

origin, she did not perform the requested examination. Detective Bolan requested an examination of various items of clothing for negroid hair. Daniels found none in the six items she examined.

Ron Raquel, a criminalist for the City of Los Angeles, performed testing on the sexual assault kit in this case. His report was dated September 28, 2004. The report did not state the date the testing was completed. Dr. Hardy gave him a pubic hair combing kit composed of a white paper bindle with a comb. On the comb he found a black hair with no root that could not be used for DNA analysis. Later Dr. Hardy gave him a slide prepared by another criminalist that had a light brown hair with a root. He found another light brown hair on the pubic combing comb without a root. The other criminalist, Daniels, had found that the hair with the root was not a pubic hair or a head hair and hence not suitable for comparison with others.

Cellmark analyst Jody Hrabal (Hrabal) received evidence from this case on September 22, 2005. She analyzed the swabs from the internal side and external sides of a condom and from V.M.'s right nipple. She also analyzed a small black hair. Hrabal determined that the sperm in the condom was not from appellant. She could not obtain a DNA sample from the sperm fraction of the right nipple swab or the hair. The unknown male who used the condom was not the same unknown male who contributed to the cells found on the left nipple swab in 2004. Neither of the unknown males matched appellant. V.M.'s DNA was not found anywhere on the external portion of the condom.

Jimmy Wong, a forensic fingerprint specialist with the LAPD, examined latent fingerprint lifts from various parts of the building on Wilshire Boulevard. Wong was able to exclude appellant as the person who left these prints.

DISCUSSION

I. Admission of Reports by Nontestifying Criminalist

A. Appellant's Argument

In his supplemental brief, appellant argues that Mahaney's reports were testimonial evidence, and the reliance upon those reports by Anderson violated

appellant's right to confront witnesses, as guaranteed by the confrontation clause of the federal Constitution. According to appellant, our Supreme Court's decision in *Geier* has been cast into doubt by *Melendez-Diaz*.

B. Relevant Authority

The confrontation clause of the Sixth Amendment of the United States Constitution provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Crawford*, *supra*, 541 U.S. at p. 42.) The confrontation clause has traditionally barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford*, at pp. 53-54.) "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*).)

C.* Melendez-Diaz *Does Not Apply to Appellant's Case; Any Error Harmless

Appellant's arguments consist of refuting the reasoning of *Geier*. He argues that the fact that the reports in this case were official records does not exempt them from the confrontation clause, nor does the fact that the witness who testified as to those reports was available for cross-examination. Appellant was not able to question the author of the reports as to their accuracy. Also, the documents were not generated as internal business records but to memorialize certain facts in the event that these facts became relevant in a future trial. The fact that the reports were contemporaneous observations does not make them beyond question. Even though Evidence Code section 801, subdivision (b) allows an expert witness to offer opinions based on matters made known to him, whether or not admissible, if such material is reasonably relied upon by experts in the field, that section

is not applicable here. The confrontation clause prohibits testimonial hearsay, and the rules of evidence cannot displace the Constitution. (See *Geier, supra,* 41 Cal.4th at pp. 605-608.)

In *Geier*, the defendant was convicted of rape and murder based in part on DNA evidence. (*Geier*, *supra*, 41 Cal.4th at pp. 593-596.) The laboratory analyst from Cellmark who performed the DNA testing did not testify at trial. A laboratory director who cosigned the report testified instead. (*Id.* at pp. 593-594.) The laboratory director stated that, in her expert opinion, the DNA of the perpetrator matched the defendant's DNA, based on the test results and the director's view of the case. (*Id*. at p. 593.) Thus, in *Geier*, an in-court witness, subject to cross-examination, was permitted to rely on laboratory notes and reports to support an expert opinion her training and experience qualified her to give.

In *Melendez-Diaz* the trial court admitted "certificates of analysis" showing only that a substance in the defendant's possession contained cocaine. The defendant challenged the admission of the evidence, citing *Crawford*. (*Melendez-Diaz, supra*, 557 U.S. ___ [129 S.Ct. at p. 2531].) The Supreme Court concluded that the certificates fell "within the 'core class of testimonial statements'" subject to the confrontation clause under *Crawford*. (*Melendez-Diaz*, *supra*, at p. ___ [129 S.Ct. at p. 2532].) The certificates were in effect affidavits made for the purpose of proving in court the nature of the substance in the defendant's possession. (*Ibid*.) Cross-examination was required to ensure the accuracy of the analysis. (*Id*. at p. ___ [129 S.Ct. at pp. 2536-2538].)

Appellant cites two appellate court opinions in support of his argument that *Geier* has been called into doubt by *Melendez-Diaz*. So far, however, *Geier* has not been overruled, and the California Supreme Court has agreed to review the cases cited by appellant, among others.[4]

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[4] The California Supreme Court has taken up several cases on this issue: *People v. Bowman* (2010) 182 Cal.App.4th 1616, review granted June 9, 2010, S182172 [*Geier*

As in *Geier* and *Melendez-Diaz*, the first issue that must be determined in assessing appellant's confrontation clause claim is whether the evidence to which he objects is testimonial. (*Melendez-Diaz, supra,* 557 U.S. ___, [129 S.Ct. at pp. 2531-2532; *Geier, supra,* 41 Cal.4th at p. 597.) The *Geier* court recognized the difficulty of this threshold issue and stated it had not found any analysis of the applicability of *Crawford* and *Davis* to the type of scientific evidence at issue in that case to be entirely persuasive. (*Geier, supra,* at p. 605.) The *Geier* court determined that such evidence was not testimonial based on its own interpretation of *Crawford* and *Davis*. (*Geier,* at pp. 605, 607.) *Melendez-Diaz*, however, undermined many of the reasons given by the *Geier* court for reaching this conclusion—as reflected in appellant's arguments. For example, *Melendez-Diaz* stated that scientific data are not neutral when they are produced *against* a defendant, and statements in business records prepared by those whose business activity "is the production of evidence for use at trial" may only be admitted into evidence if subject to the requirements of the confrontation clause. (*Melendez Diaz*, 557 U.S. ___, [129 S.Ct. at pp. 2533, 2538].)

If the documents prepared by Mahaney constituted testimonial evidence, the issue becomes whether the holding in *Melendez-Diaz* prohibits the admission of their contents as testified to by Anderson. *Melendez-Diaz* does not provide an answer, since in that case, no laboratory analyst took the stand, and the government relied solely on a sworn

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still valid]; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213 [*Geier* still valid and distinguishable from *Melendez-Diaz*]; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620 [*Geier* still valid and distinguishable from *Melendez-Diaz*]; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted December 2, 2009, S176886 [expert's testimony based on another expert's report inadmissible under *Melendez-Diaz*]; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted December 2, 2009, S177046 [*Geier* disapproved by *Melendez-Diaz*]. We note that the United States Supreme Court denied a petition for certiorari in *Geier* four days after its decision in *Melendez-Diaz*. (*Geier, supra,* 41 Cal.4th 555, cert. den. *sub nom. Geier v. California* (2009) _____ U.S. _____ [129 S.Ct. 2856].)

report called a "certificate of analysis." (*Melendez Diaz, supra*, 557 U.S. ___, [129 S.Ct. at p. 2531].) In that case, in contrast to the instant case and *Geier*, the document was the only evidence against the defendant.

The evidence in the instant case would clearly be admissible without violating appellant's Sixth Amendment rights under *Geier*, and, as we have noted, *Geier* has not been overruled. Under *Geier*, since appellant was given the opportunity to cross-examine Anderson, the expert who used Mahaney's report in his testimony, appellant was not deprived of his Sixth Amendment right to confront and cross-examine witnesses against him. (*Geier*, *supra*, 41 Cal.4th at p. 607.)

In any event, we conclude in the instant case that even if appellant's right of confrontation under the Sixth Amendment was violated when he was not afforded the opportunity to cross-examine Mahaney, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) First, rather than providing second-hand evidence of the results of incriminating tests, as occurred in *Melendez-Diaz* and *Geier*, Anderson merely provided chain-of-custody evidence. In *Melendez-Diaz* the Supreme Court stated, "Contrary to the dissent's suggestion, . . . we do not hold . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody,' . . . this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation . . . from *United States v. Lott*, 854 F.2d 244, 250 (C.A.7 1988), 'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. . . ." (*Melendez-Diaz, supra*, 557 U.S. at p. ___, fn. 1 [129 S.Ct. at p. 2532].)

The majority in *Melendez-Diaz* clearly does not believe that the live witness who establishes the chain of custody need be the person who actually "laid hands" on the evidence at every stage. In this case, although the first step in the chain of custody—the collection of evidence—is an important one, we conclude that the expert testimony of Anderson, a live witness who was subject to cross-examination, was sufficient to protect appellant's Sixth Amendment rights. Every other person involved in the chain of custody and testing of the samples was subject to cross-examination.

Anderson was called as an expert witness, as appellant concedes. Anderson told the jury that, at the time of trial, he had been a criminalist for 17 years and had been a supervisor for 12 years. He recounted his education, training and experience, and described the duties of a field criminalist. Anderson testified that Mahaney had been a senior criminalist and had retired from the coroner's office after approximately 30 years.

Anderson's testimony covered the period from the initial collection of evidence on December 29, 1992, through January 8, 1993, when Detective Bolan collected all the evidence from the coroner's office and took it to the Wilshire station, where he booked the items into evidence. Anderson obtained all the records from the V.M. case from the criminalistic folder in the coroner's laboratory. A folder is maintained for each case, and each case is assigned a unique case number.

Anderson described a sexual assault kit and how evidence is collected for the kit. Based on Mahaney's reports, Anderson testified that Mahaney collected some evidence from the body at the scene and then took more evidence from the body after it was transported to the coroner's facility. He described the method of recording and documenting the collected evidence. He described the use of the form 81 and the evidence log, which documents the chain of custody of all evidence associated with a particular coroner's case.

In preparation for his testimony, Anderson had reviewed the criminalistic report by Mahaney, the form 81, the evidence log, and investigative reports by the coroner's investigator. Anderson stated that Mahaney's entries on the evidence log appeared to

have been made properly. Anderson demonstrated that the sexual assault kit had a unique identifying number that matched all the numbers on all the swabs and smears it contained. He showed the jury where the evidence log stated that the blood sample was drawn by Dr. Selser, the pathologist (who testified later in the case). Anderson showed the jury where the form indicated the date the evidence was received in the evidence room and when it was released. Anderson read aloud the information on the form indicating the chain of custody for the hair kit, the pubic hair kit, and the sexual assault kit up until the release of these items to Detective Bolan. He described where and how the evidence is stored from the time it is collected until it goes to the evidence room.

Anderson described the form 81—the sexual assault evidence data sheet—in detail. Anderson demonstrated which items were collected, as indicated by Mahaney's initials, and which were described as "not collected" or "not seen." All the items were received in the evidence room on January 7, 1993, and released to Detective Bolan on January 8, 1993.

During his cross-examination, defense counsel ascertained that Anderson had not spoken to Mahaney, had not been at the crime scene, and that all of Anderson's testimony was based on the documents he reviewed. Defense counsel elicited that Mahaney's documents would not reflect whether evidence had been moved, touched, or altered before the coroner's office became involved in the case. Anderson did not know who the transport personnel were who took the victim to the coroner's office. Anderson acknowledged that no swabs were taken from the ligatures used to bind the victim, and no swabs had been taken from some of the bruises on the victim's body. Anderson admitted his knowledge in this regard was based only on the fact that swabs from these items were not documented on the evidence sheet. Anderson also admitted he had no personal knowledge that the fingernail clipping kit consisted of clippings and scrapings from the victim. Finally, counsel elicited that the coroner's protocol regarding the handling of evidence had changed since 1992. On recross-examination, defense counsel

elicited that the coroner's criminalist does not determine how the evidence came to be at the point where it is collected or when it got there.

Based on this record, even if the initial link in the chain of custody were deemed to require live testimony from the actual criminalist who collected the evidence, we would find harmless error in the instant case. The samples were collected and preserved 12 years before they were tested for DNA, and police had no suspects until the testing occurred, thus obviating any claim that evidence was planted so as to incriminate appellant. The defense was able to cross-examine Anderson as to the limits of any criminologist's ability to determine if the evidence was somehow tampered with or tainted before its collection. As we have noted, the person who tested the victim's DNA samples and appellant's DNA sample testified in court. Yamauchi testified that he was the criminalist who analyzed the sexual assault evidence in the instant case in January 1993. He reviewed his own reports and testified regarding the semen he found on the condom and the spermatozoa fragments he found on the slides and on a swab which were obtained from various areas of the victim's body. As for the evidence from which appellant's DNA was obtained, it was collected by Detective Coulter, who also testified.

Dr. Hardy testified that he examined the sexual assault kit in 2004, and the box was still sealed with Yamauchi's seal when Dr. Hardy collected it. Dr. Hardy submitted the external genital sample to Cellmark for DNA testing along with the victim's blood sample and nipple swab and appellant's buccal swab. The person who actually analyzed the DNA and issued a report with the results of the analysis, Kelly Brockhohm, also testified.

Unlike the situation considered in *Melendez-Diaz*, the absent witness in this case was not the one providing the result of the analysis—he was merely the collector. Mahaney's "proficiency and methodology" in this capacity were adequately demonstrated in the documents he provided, which were interpreted by the expert who explained them to the jury and who was subject to cross-examination. (*Melendez-Diaz*, *supra*, 557 U.S. ___ [129 S.Ct. at p. 2538].) As for Mahaney's "honesty," another

criterion mentioned in *Melendez-Diaz* [129 S.Ct. at p. 2538], the jury had sufficient information from which to infer whether it was subject to question.[5]

Accordingly, appellant's argument that his conviction must be reversed because his Sixth Amendment rights were violated is rejected. We likewise reject appellant's remaining arguments, as we did in the previous opinion in this case, from which the following paragraphs are largely extracted.

II. Sufficiency of the Evidence

A. Appellant's Argument

Appellant contends the evidence presented at trial was insufficient. Although there was evidence that appellant was present at some time when V.M.'s body was in the building, there was no evidence that appellant was the person who killed her, or that V.M. was raped and that it was appellant who raped her. There was also no evidence regarding the actions appellant might have taken as an aider and abettor that assisted the actual killer in the commission of the crime.

B. Relevant Authority

"In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: '[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citations.] The United States Supreme Court has held: '[T]his inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt

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5 The *Melendez-Diaz* Court observed that techniques, reliability, and the types and numbers of potential errors varied greatly in the forensic science disciplines and that issues of subjectivity, bias, and unreliability exist. The Court stated, "Contrary to respondent's and the dissent's suggestion, there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts." (*Melendez-Diaz, supra,* 557 U.S. ___ [129 S.Ct. at p. 2538].)

beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] . . . . 'Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citations.]" (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430.)

Given this court's limited role on appeal, defendant bears an enormous burden in arguing insufficient evidence to sustain the verdict. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Even if the circumstances may be reconciled with a contrary finding, as long as substantial evidence supports the verdict, the judgment must be affirmed. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"'"'"Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."' [Citation.]"' (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Because intent can seldom be proven by direct evidence, it typically is inferred from the circumstances. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1469; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099; *People v. Wilkins* (1972) 27 Cal.App.3d 763, 773.)

C. Evidence Sufficient

Appellant was tried under a theory of premeditated and deliberate murder and felony murder. A killing committed in the perpetration of rape is first degree felony murder. (§ 189; *People v. Hart* (1999) 20 Cal.4th 546, 608.) The required intent for felony murder is simply the specific intent required to commit the underlying felony. (*People v. Hart*, at p. 608.) Liability for a felony murder is borne by those who knowingly and purposefully participate in the underlying felony, even if they do not participate in the killing. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1159.)

The evidence showed that V.M. was indeed raped. Dr. Selser of the coroner's office saw two small abrasions and tears laterally on the labia majora on the left and right side. There was redness around the clitoral area and small tears along the upper and posterior aspect of the entrance to the vagina. Dr. Selser saw a small area of hemorrhage inside the posterior of the vaginal wall. The hemorrhage in the vaginal wall was made on or about the time of death. There was also a pattern injury on the back of the buttock that suggested it was made by a hand. The injuries were consistent with a sexual assault. Dr. Selser explained that she could not classify the assault as a rape, since rape involved a consent factor that she could not determine.

V.M.'s injuries in the neck and mouth suggested that the cause of death was a combination of strangulation and suffocation. The evidence thus suggested that V.M. was raped while she was being deprived of oxygen. Dr. Selser stated that she believed V.M. died "during and because of the assault on her." A very large amount of sperm containing only appellant's DNA was found on the exterior of the vagina. Even though the low level of sperm found in the interior of the vagina could not be tested, and there was a small amount of sperm and the DNA of an unknown male on V.M.'s nipples, there was sufficient evidence for the jury to reasonably find that appellant was guilty of murder during a rape either as the direct perpetrator or as an aider and abettor.

The scenario presented by appellant—that appellant entered the building after an unknown male raped V.M. and masturbated after V.M. was already dead—is not a reasonable one. A rational trier of fact would have rejected appellant's suggested scenario for the more reasonable and less speculative inference that appellant killed V.M. or aided and abetted her killing while participating in the act of raping her.

III. Competency of Counsel

A. Appellant's Argument

Appellant claims his trial counsel prejudicially failed to raise and/or properly present arguable issues on his behalf. In particular, defense counsel failed to object to the

evidence barred by the hearsay rule, and he failed to object to fatal flaws in the chain of custody of the DNA evidence.

B. Relevant Authority

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's "acts or omissions were outside the wide range of professionally competent assistance" (*Strickland v. Washington* (1984) 466 U.S. 668, 690 (*Strickland*)). Appellant must also establish that the challenged act or omission did not result from an informed tactical choice within the range of reasonable competence. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) If the record sheds no light on why counsel acted or failed to act, the appellate court should affirm unless there could be no satisfactory explanation for the act or omission. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

Secondly, appellant must show that the alleged deficiencies in counsel's performance were prejudicial to the defense, i.e., that there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. (*Strickland, supra,* 466 U.S. at p. 694; *People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.) A reasonable probability is one "sufficient to undermine confidence in the outcome." (*Strickland, supra,* at p. 694.)

A court need not assess the two factors of the inquiry in order. If there is an inadequate showing on either factor, it need not be addressed. (*Strickland, supra,* 466 U.S. at p. 697.) Thus, if the record reveals that appellant suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Ibid.*)

C. Counsel Not Ineffective

With respect to counsel's alleged failure to object on *Crawford* grounds to the evidence stemming from Mahaney's reports, we have concluded that these reports were properly used in Anderson's testimony to establish the chain of custody and, if not, any error was harmless beyond a reasonable doubt. Therefore, defense counsel was not

ineffective for failing to object to the reports, and appellant suffered no prejudice from any failure to object to the use of these reports.

We disagree with appellant's premise that there were objectionable chain-of-custody issues. Our Supreme Court has repeatedly held that "[i]n a chain of custody claim, '"[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 134; see also *People v. Lucas* (1995) 12 Cal.4th 415, 444.)

In this case, appellant mentions specifically the chain of custody for evidence relating to the sexual assault kit. He states that it could not be determined how the kit made it to the LAPD—whether it was sent to the evidence room, or whether it was "just immediately released from that holding area." Also, it could not be determined whether Dr. Selser took the autopsy blood sample to the evidence room or whether another person did so. Appellant's last complaint is that Yamauchi did not recall when he returned the sexual assault kit to the evidence control unit.

These details extracted from the testimony do not show failures in the chain of custody. Appellant's first complaint—that the evidence log showed an item belonging to the sexual assault kit was taken to LAPD by unknown means—is based on a misunderstanding of the record. Anderson was actually telling the prosecutor that he did not know how the LAPD acquired a beige vest sweater found at the scene. The box on the evidence log for the date of receipt into the evidence room was blank. Anderson

explained that clothing found at a homicide scene is often saturated with blood or other fluids and must be dried prior to final packaging and placement in the evidence room. It is hung in a secured cage to dry and later packaged by evidence-room staff. In this case, it appeared the beige vest sweater never went to the evidence room and was released to the LAPD from the holding area.

The beige vest sweater Anderson was discussing had no effect on the proof in this case. It did not serve as the foundation of any significant evidence produced. Therefore, it was not relevant, and no objection to the gap in its chain of custody was called for. Counsel is not required to make futile or frivolous objections. (*People v. Price* (1991) 1 Cal.4th 324, 386-387.)

With respect to the typing blood sample taken by Dr. Selser during the autopsy, Anderson stated he was not sure if the doctor took it to the evidence room directly or whether another party would have been involved. Anderson said he would need to consult additional records to determine if the blood sample went to the laboratory and the laboratory took it to the evidence room.

The record showed that Dr. Selser collected the blood sample on December 30, 1992, and recorded it on the log sheet. The blood was received by the evidence room at 3:00 p.m. on the same day. Yamauchi stated that when he picked up the sexual assault kit and the blood, the evidence did not appear to have been tampered with. If it had, he would have noted it on his report. Dr. Hardy, who checked out the blood vial from the victim in 2004 stated that the envelope containing the vial did not appear to have been tampered with in any way. There was no reasonable possibility that the victim's blood sample had been tampered with, and therefore appellant suffered no prejudice by counsel's failure to object on the basis of a chain of custody issue regarding this blood sample.

As for appellant's last point, it is true that Yamauchi did not recall when he returned the sexual assault kit to the evidence control unit. He stated that this information would be in his notes, but he no longer had them. The only way to track the exact dates of collection and return of the evidence was to find the card where this information was recorded. Unfortunately, these cards were stored in such a fashion that it was not possible to access them at the time of trial.

Yamauchi explained that while the evidence was in his custody, he analyzed it. Upon finishing his analysis, he sealed it with a yellow analyzed-evidence seal that bore his name and the date, and he then returned it to the property evidence control unit. He stated that any other analyst who subsequently took the evidence from the property unit and saw his seal could establish that the evidence had not been tampered with between the time it was in his custody and the time the other analyst received it. Dr. Hardy, who examined the rape evidence in 2004, testified that he obtained the sexual assault kit from the central evidence control facility, and the kit had a number of seals. The topmost seals were two criminalist's yellow seals signed by Yamauchi and dated March 12, 1993. Thus, the evidence was not tampered with, and the lack of an exact date for Yamauchi's return of the evidence to the evidence control unit was no basis for objecting as to the chain of custody.

Accordingly, the record provides reasonable explanations for defense counsel's failure to move to exclude these items of evidence on chain of custody grounds. The gaps appellant points to were not significant, and any suggestion that they resulted in tampering with the evidence is the "barest speculation." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 134.) "'[T]he mere fact that counsel, had he [or she] chosen another path, "might" have convinced the court to issue a favorable evidentiary ruling, is not enough to carry defendant's burden of demonstrating [incompetence]. . . .' [Citation.]" (*People v. Lucas, supra,* 12 Cal.4th at p. 445.)

In addition, by not obtaining an adverse ruling on such a motion, counsel was better able to argue the chain of custody implications to the jury at the close of the case. This was a reasonable trial strategy in this case and one of which he took full advantage. "[A]n objection on chain of custody grounds may be less productive for defendant than a decision to permit the prosecutor to establish a shoddy chain of custody that can be pointed out to the jury in the hope of giving rise to a reasonable doubt." (*People v. Lucas, supra,* 12 Cal.4th at p. 446.)

Furthermore, because there was a """reasonable certainty""" (*People v. Catlin, supra,* 26 Cal.4th at p. 134) that evidence tampering did not occur, the trial court would clearly have overruled any objections. Therefore, appellant was not prejudiced by counsel's failure to move to exclude the evidence he finds objectionable. We reject appellant's claim of ineffective assistance of counsel.

IV. Security Fee

The People point out that the trial court failed to impose a $20 security fee for each conviction as required by section 1465.8, subdivision (a)(1). The record confirms that the trial court imposed only one $20 fee.

A trial court's failure to impose mandatory fees and assessments is an unauthorized sentence that we must correct on appeal even though the issue was not raised by the parties in the trial court or on appeal. (See *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; see also *People v. Burnett* (2004) 116 Cal.App.4th 257, 260.) The section 1465.8 court security fee is mandatory. (*People v. Alford* (2007) 42 Cal.4th 749, 754.)

Accordingly, the trial court's failure to impose one of the court security fees resulted in an unauthorized sentence that we must correct.

DISPOSITION

The judgment is modified to impose a court security fee of $40 under section 1465.8 instead of the $20 fee imposed and recorded on the abstract of judgment. In all other respects, the judgment is affirmed. The superior court is directed to send a corrected abstract reflecting this change to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD